

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 March 2010

Case No: 2008-LDA-00376
OWCP No: 02-149672

In the Matter of:
JAMES G. MITCHELL,
Claimant,

v.

SERVICE EMPLOYEES INTERNATIONAL, INC.,
Employer,
and
INSURANCE CO. OF THE STATE OF PENNSYLVANIA,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:

Joel Mills, Esq.
For Claimant

John Schouest, Esq.
For Employer

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER AWARD OF BENEFITS

This proceeding arises from a claim under the Defense Base Act, 42 U.S.C. § 1651 *et seq.*, an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the "Act"). The Defense Base Act provides workers' compensation coverage for employees of American contractors engaged in construction related to military bases in foreign countries and to foreign projects related to the national defense, whether or not the project is located on a military base. *Afla/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1112 (5th Cir. 1991).

Claimant, James G. Mitchell, is seeking compensation and medical benefits from Service Employees International, Inc. and Insurance Company of the State of Pennsylvania for alleged work-related injuries suffered in Iraq on May 2, 2006. This case was referred to the Office of Administrative Law Judges on August 6, 2008.

Following proper notice to all parties, a formal hearing was held on March 27, 2009, in Columbus, Ohio. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence.¹ The parties subsequently filed post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered.

Background and Summary of the Medical Evidence

Claimant was born in 1955 and is a high school graduate. (Tr. 26). He worked as a truck driver from 1983 until the 2006 injury. (Tr. 28). Prior to that, Claimant worked for a greenhouse, motel, foundry, and automotive parts manufacturer. (Tr. 27). He was also a prison guard and did home repair work. (Tr. 28). In addition, Claimant is a veteran of the Marine Corps. *Id.*

In 2005, Employer hired Claimant to be a heavy truck driver in Iraq. (EX 1). He worked from August 2005 until May 2006. (Tr. 28). Claimant testified that he worked twelve hours per day, seven days per week, and sometimes eighteen or twenty hours per day, during which time, Claimant was required to wear bulletproof vests and protective headgear. (Tr. 29).

On the date of the injury, Claimant was driving a truck in a convoy. (Tr. 30). The nighttime road conditions were dusty, and the trucks were required to drive with only fog lights at a rate of 60 miles per hour. *Id.*; tr. 39. At approximately 3:30 am, the lead truck hit an improvised explosive device (IED), which left a hole in the road. (Tr. 30). Upon impact with the hole, Claimant was thrown up into the ceiling of the truck. *Id.* He hit his head on top of the truck's cab and fell back down onto the seat, which then bottomed-out onto the floor of the cab. *Id.* He testified that he hit his head so hard that he saw "white lights." (EX 14-9). Claimant reported back pain to his convoy commander, completed the mission, and sought medical attention when he returned to Camp Anaconda. (Tr. 31). The medics at Camp Anaconda prescribed pain medication and a hot compress. (EX 12-2).

Claimant completed three more convoys and then returned to the United States on R&R around May 20, 2006. (Tr. 32). Because Claimant was experiencing back pain, he sought medical

¹ References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant, and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

treatment. *Id.* Claimant testified that Dr. Iorio told him that surgery would not be a viable option, absent an emergency. (Tr. 32-33). Instead, Claimant began a course of physical therapy treatments. (CX 1). Claimant now uses a home traction machine to manage the pain; sometimes twice a day, for forty-five minutes to an hour at a time. *Id.* Claimant also takes pain medications in order to manage the pain. (Tr. 35). Because of the back injury, Claimant testified that he is unable to hunt or fish. (Tr. 43). Claimant is also unable to enjoy playing the guitar anymore since he has problems sitting for a long period of time. *Id.*

Upon returning to the United States, Claimant first sought medical attention from Clark D. Iorio, D.O. (Tr. 32). The record contains medical reports, treatment notes, MRI reports, and physical therapy records dated June 2006–April 2007. (CX 1). Dr. Iorio diagnosed a cervical sprain and thoracic sprain and recommended physical therapy. (CX 1-3 and 1-6) Dr. Iorio further reported that maximum medical improvement had not been reached. (CX 1-5 and 1-8).

Claimant then filed a claim for compensation under the Act. (EX 5). In connection with this claim, Michael R. Viau, M.D., examined Claimant on May 2, 2007. (CX 1-43). At that time, he opined that Claimant was permanently and totally disabled and reported that maximum medical improvement had been reached. *Id.* He limited many activities, including sitting, walking, standing, reaching, reaching above the shoulder, pushing, pulling, lifting, and climbing. *Id.*

Six months later, on November 12, 2007, Perry N. Funk, D.O., examined Claimant. (EX 13). He obtained an occupational and medical history. *Id.* Dr. Funk also reviewed Dr. Viau's medical report and Claimant's other medical records. *Id.* Dr. Funk diagnosed chronic cervical and thoracic dysfunction caused by the May 2006 injury. *Id.* He reported that Claimant's condition was stable and that Claimant may benefit from further medical treatment by a pain management specialist. *Id.* Dr. Funk recommended that Claimant continue with the home-based therapy, including self-directed exercises and home traction. *Id.* Dr. Funk reported that maximum medical improvement had been reached as Claimant's condition had stabilized with no expectation of change in the condition despite continued medical treatment. *Id.* Dr. Funk opined that Claimant would not be able to return to his previous occupation as a heavy truck driver. *Id.* But Dr. Funk opined that Claimant would be able to return to work in a limited light duty capacity. *Id.* Reasonable permanent restrictions would include: "no lifting over twenty pounds; minimal bending and twisting, with no bending below waist level; and frequent position changes." *Id.*

Stipulations

1. The Act applies to this claim;
2. Claimant and Employer were in an employer/employee relationship at the time of the injury;
3. Claimant suffered an injury to his upper back, neck, spine, and body generally that arose out of and in the course of his employment;
4. The Employer was timely notified of the injury;
5. Claimant's average weekly wage at the time of injury was \$1,675.90;
6. Following the injury, Claimant received temporary total disability payments at a rate of \$1,073.64 per week from May 22, 2006, through the present;
7. Employer has paid medical bills in an unspecified amount;
8. Claimant has not returned to his usual job;
9. There is no evidence of suitable alternative employment.

(Tr. 15-16; Employer's Post-Hearing Brief).

Issues

Claimant contends that he suffered a compensable back injury on May 2, 2006, while working for Employer in Iraq. He contends that he reached maximum medical improvement one year later, on May 2, 2007. He further contends that he is permanently and totally disabled and that benefits should be based on an average weekly wage of \$1,675.90. Finally, Claimant contends that he is entitled attorney's fees and expenses.

Employer concedes that Claimant suffered a compensable injury and has reached maximum medical improvement (MMI). But Employer disputes the date that Claimant reached MMI. Employer argues that the relevant date was six months later—November 12, 2007. Employer concedes that Claimant is totally and permanently disabled and that there is no suitable alternative employment. Finally, Employer contends that it is entitled to Section 8(f) relief.

The Director has responded to Employer's request for Section 8(f) relief. The Director maintains that there is no evidence to support the claim and requests that the 8(f) Application be denied.

Thus, the following issues remain for resolution:

1. Date Claimant reached maximum medical improvement.
2. Employer's entitlement to Section 8(f) relief.
3. Claimant's entitlement to penalties, interest, attorney's fees and costs.

Law and Analysis

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). The claimant bears the ultimate burden of persuasion by a preponderance of the evidence. 5 U.S.C. § 556(d). Here, the parties have stipulated that Claimant suffered an injury, compensable under the act, which resulted in permanent and total disability. The only disputed fact is the date on which Claimant's injury became permanent.

First, the parties have stipulated that Claimant's current injury arose out of and in the course of his employment in Iraq, and therefore, is compensable under the Act. Section 2(2) of the Act defines "injury" as an "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). The record contains sufficient evidence to establish that Claimant suffered an injury caused by his employment. Thus, I find that Claimant's current injury arose out of and in the course of his employment in Iraq, and therefore, is compensable under the Act.

The parties have further stipulated that claimant is totally disabled. The Act defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," but does not provide a standard to distinguish between total disability and partial disability. 33 U.S.C. § 902(10). The Fifth Circuit holds that "[t]he degree of disability is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do." *Roger's Terminals and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 690 (5th Cir. 1986) (citing *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037-38 (5th Cir. 1981)). The record contains evidence consistent with the parties' stipulations. Thus, I find that Claimant is totally disabled.

Finally, the parties have stipulated that Claimant is permanently disabled, although they dispute the date that Claimant's disability became permanent. The point of maximum medical improvement represents the beginning of permanent disability under the statutory scheme. *Louisiana Ins. Guaranty Assoc. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994). The date upon which a claimant reached maximum medical improvement is relevant to the determination of his rate of compensation. See 33 U.S.C. § 910(f) (providing for annual adjustments of permanent total disability benefits but not for temporary total disability benefits). The date that a claimant's disability becomes permanent is also relevant to an employer's entitlement to Section 8(f) relief. Maximum medical improvement is achieved when a claimant's condition "has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in

which recovery merely awaits a normal healing period.”² *Louisiana Ins. Guaranty Assoc. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994) (quoting *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968)).

Drs. Viau and Funk agree that Claimant reached maximum medical improvement (MMI). On May 2, 2007, Dr. Viau found that Claimant was permanently and totally disabled and specifically indicated that MMI had been reached. (CX 1-43). Six months later, Dr. Funk made the same finding. The point when no further medical improvement was possible and Claimant’s injury had healed to the fullest extent possible was in May 2007, as first reported by Dr. Viau. Thus, I find that Claimant reached maximum medical improvement on May 2, 2007.

Pursuant to Section 7(a) of the Act, the employer is responsible for medical expenses that are reasonable, necessary, and appropriate for the treatment of a claimant’s work-related injury. 33 U.S.C. § 907(a); 20 C.F.R. §§ 702.401 and 702.402. The specific treatment sought must be “recognized as appropriate by the medical profession for the care and treatment of the injury.” *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300, 303 (1984). A claimant establishes a *prima facie* case of compensability by presenting evidence that a qualified physician has deemed such treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). To avoid liability for the cost of the treatment, the employer must present evidence that the treatment is unreasonable or unrelated to the injury. See *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended*, 164 F.3d 480, (9th Cir. 1999). The claimant retains the right to make decisions about his own medical care, and “when . . . faced with two or more valid medical alternatives, it is the patient, in consultation with his own doctor, who has the right to chart his own destiny.” *Id.* (citing 1 Larson’s Workers’ Compensation Law § 13.22(e) (1998)).

There is no evidence that Employer contested Claimant’s right to continuing medical benefits under Section 7. Also, no argument was advanced by Employer that it contests the medical expenses that remained outstanding at the time of the hearing. Thus, I do not consider such expenses to be contested and assume they will be paid, if still outstanding, by an award of continuing benefits under Section 7 of the Act. I therefore find that Claimant is entitled to the payment or reimbursement of all reasonable and necessary medical expenses relating to the injury that occurred on May 2, 2006, while Claimant was employed by Service Employers International, Inc.

² *Accord: Palombo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991) (viewing the date of maximum medical improvement as “the point when the injury has healed to the full extent possible”); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990) (defining maximum medical improvement as “the time at which no further medical improvement is possible”); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1257 (9th Cir. 1990) (explaining that “[m]aximum medical improvement is attained when the injury has healed to the full extent possible”).

Section 8(f)

Employer seeks relief pursuant to Section 8(f) of the Act, which shifts liability for permanent disability benefits from the employer to the Special Fund in certain circumstances. 33 U.S.C. § 8(f). To receive Special Fund relief in a case of permanent total disability, the employer must establish (1) that the employee seeking compensation had an existing permanent partial disability before the employment injury, (2) that the permanent partial disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. *Two R Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990). The requirement that the preexisting disability be manifest to the employer does not necessarily require actual knowledge. See *Edward & Sons Shipyard v. Smith*, 862 F.2d 1220, 1223 (5th Cir. 1989). Although Employer argues that it is entitled to Section 8(f) relief, it has presented no evidence on this issue. Accordingly, I find that Employer is not entitled to such relief.

Interest

A claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on any unpaid compensation owed by the Employer should be included in the District Director's calculations of amounts due.

Attorneys Fees

Thirty days is hereby allowed to Claimant's counsel for the submission of an application for attorney's fees. See 20 C.F.R. § 702.132. A service sheet showing the service has been made upon all the parties, including the Claimant, must accompany this application. The parties have twenty days following the receipt of any such application within which to file any objections.

ORDER

It is hereby ordered that the claim of James Mitchell for benefits under the Act is GRANTED.

1. Claimant is entitled to temporary total disability benefits for the period of May 2, 2006–May 2, 2007, and permanent total disability benefits thereafter;
2. Claimant reached maximum medical improvement on May 2, 2007;
3. Claimant's average weekly wage for the purpose of calculating benefits is \$1,675.90;

4. Claimant is entitled to ongoing medical treatment for his back condition. Claimant is entitled to any surgical procedures for his back condition that his treating physicians deem appropriate;
5. Employer's request for Section 8(f) relief is denied;
6. The District Director shall determine and assess the appropriate rate of interest for any unpaid accrued benefits computed from the date on which each payment was originally due to be paid, in accordance with 28 U.S.C. § 1961;
7. The District Director shall make all calculations necessary to carry out this order; and
8. Employer shall pay Claimant's attorney's reasonable fees and costs, to be determined in a supplemental decision and order. A period of thirty days is hereby allowed for Claimant's counsel to submit an application for attorney's fees and costs. Any objections shall be filed within twenty days following receipt of the application.

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JOSEPH E. KANE
Administrative Law Judge